SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA,

Petitioner,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT.

ELLIS ARNALL,
Attorney General of Georgia,
Counsel for Petitioner.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

Statutes at Large:

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

STATE OF GEORGIA,

Petitioner,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Georgia prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above entitled cause on October 30, 1941 (R. 42), affirming the judgment of the District Court for the Northern District of Georgia.

Statement.

A civil action was instituted March 25, 1941, by a complaint in the District Court to recover from the respondents $384,081.39. The complaint, brought in two counts, alleged in substance that the respondents had violated Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, commonly known as the Sherman Act, and that by reason of such violation the State of Georgia was injured and damaged in its property in the actual amount of $128,027.13. The prayer was for treble damages, the State of Georgia seeking to derive its right of action under Section 7 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 210, as supplemented by Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 731, 15 U. S. C. 15. (R. 1-26).[1]

By separate motions, the respondents sought to have the complaint dismissed on the ground that the State of Georgia was not a "person" upon whom a right of action for treble damages was conferred by Section 7 of the Act of July 2, 1890, or Section 4 of the Act of October 15, 1914. (R. 27-34).

The District Court sustained the motions to dismiss, and on July 31, 1941, entered separate judgments dismissing the complaint against each of the respondents. (R. 34).

An appeal was prosecuted to the Circuit Court of Ap-

---

[1] The complaint referred to Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15 (R. 2 & 15), commonly known as the Clayton Act, because that section, being later in date and broader in scope than Section 7 of the Sherman Act, was believed to have superseded the latter, the Sherman Act being expressly included in the definition of "Anti-trust laws" as used in the 1914 Act. See 38 Stat. 731. After the complaint was filed, this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667, construed Section 7 of the Sherman Act. The District Court and Circuit Court of Appeals construed the complaint as one brought under Section 7 of the Sherman Act (R. 34 & 42). For this reason references in the petition nad brief are to both sections.

peals and on October 30, 1941, that court entered a judgment affirming the judgment of the District Court. (R. 42).

A petition for rehearing was filed Nov. 17, 1941 (R. 43) was entertained and was denied December 15, 1941 (R. 47). The mandate was stayed (R. 49).

The Question Presented.

Whether the State of Georgia when it has been injured in its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Ch. 647, 26 Stat. 209, 15 U. S. C. 1 and 2, may maintain a civil action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Ch. 323, 38 Stat. 731, 15 U. S. C. 15.

Statutes Involved.

Section 7 of the Act of July 2, 1890, Ch. 647, 26 Stat., 209, 210, provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section 8 of the Act of July 2, 1890, Ch. 647, 26 Stat. 210, 15 U. S. C. 7 provides:

> "That the word 'person,' or 'persons,' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15, provides:

> "That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Section I of the Act of October 15, 1914, Chapter 323, 38 Stat. 730, provides in part:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled that 'Anti-trust laws,' as used herein, includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July 2, 1890; * * *."

Statement of Jurisdiction.

(1) This Court has jurisdiction to consider and grant this petition pursuant to Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. Section 347 (a).

(2) The original date of the judgment to be reversed is October 30, 1941 (R. 42). The petition for rehearing was filed Nov. 17, 1941, within the time provided by the rules of the Circuit Court of Appeals (R. 43), and the petition for a rehearing was denied December 15, 1941 (R. 47). The petition for certiorari was filed January 16, 1942, so that this petition is filed within the time prescribed by the Act of February 13, 1925, as amended, on which jurisdiction rests.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In affirming the judgment of the District Court.

(2) In holding that the case was controlled by the decision of the Supreme Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667;

(3) In applying the reasoning of the court and the conclusion reached in the case of *United States* v. *Cooper Corp.*, 312 U. S. 60, 61 Sup. Ct. 742, 85 L. Ed. 667, to a case in which a State and not the United States seeks to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(4) In failing to hold that when it has suffered injury to its property by reason of a violation of Sections 1 and 2 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 15 U. S. C. 1 and 2, the State of Georgia is a "person" for the purpose of determining whether it may maintain an action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

(5) In construing the word "person" in that portion of Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, affording a right of action for treble damages to "any person" as excluding the State of Georgia.

(6) In failing to hold that a State is entitled to maintain an action for treble damages under Section 7 of the Act of July 2, 1890, and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

Reasons Relied On for Granting the Writ.

(1) The Circuit Court of Appeals construed Section 7 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 210, to exclude a State from a right of action for treble damages given by that Section. This Court has not as yet construed that Act on that question. The case involves a decision on an important question of Federal law not decided by this Court.

(2) The question squarely presented in this case is one of great importance which it is believed will again arise unless decided by this Court. In performing the functions necessary to the welfare of their people, the States purchase large quantities of commodities moving in interstate commerce. The money used in these purchases is largely derived from taxes imposed upon citizens of the States, and the States act as trustees in expending this money. The danger of injury to the property of the State by reason of a violation of the United States Anti-trust laws and especially of Sections 1 and 2 of the Sherman Act is always present. The instant case where the actual damage alleged was $128,027.13 (R. 14, 15, 24, 25, 26) is but illustrative. The question is one in which every State has an interest and which the States and their citizens and taxpayers are entitled to have settled.

(3) The decision of the Circuit Court of Appeals is believed to be founded upon an erroneous interpretation and application of the decision of this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 Sup. Ct. 742, 85 L. Ed. 667. In that case this Court held that the United States is not a "person" authorized to bring an action for treble damages under Section 7 of the Sherman Act. The reasoning and the rationale of that decision is not applicable to

a State, and the conclusions there reached were not controlling on the Circuit Court on the issue here involved. The right of a State under the United States Anti-trust laws to the protection of its proprietary interests was not before the Court in the *Cooper* case. The decision of the Circuit Court is believed to be in conflict with the decisions of this Court in *Pennsylvania* v. *Wheeling and Belmont*, 13 How. 518, 559, 14 L. Ed. 249, 266; *Texas* v. *White*, 7 Wall. 700, 19 L. Ed. 227; *Florida* v. *Anderson*, 1 Otto 667, 675, 23 L. Ed. 290, 297; *Missouri* v. *Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Kansas* v. *Colorado*, 185 U. S. 125, 46 L. Ed. 838; and *Minnesota* v. *Northern Securities Company*, 194 U. S. 48, 68-71, 48 L. Ed. 870, 880-881, which affirmed the right of a State to sue to redress injuries which are analogous to those suffered by private individuals.

The decision of the Circuit Court is also believed to be in conflict with *Ohio* v. *Helvering*, 292 U. S. 360, 370, 78 L. Ed. 1307, 1310, which construed an Act of Congress using the word "person" as including a State within that designation. The decision of the Circuit Court is also believed to be in conflict with *Hall* v. *Wisconsin*, 13 Otto 5, 11, 26 L. Ed. 302, 305; *Murray* v. *Charleston*, 6 Otto 432, 445, 24 L. Ed. 760, 763; *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 390, 38 L. Ed. 1014, 1021, which recognize the status of a State as an individual when it engages in ordinary commercial transactions with individuals.

(4) If the Circuit Court was correct in holding that this case is controlled by the decision of this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 667, then petitioner respectfully requests a review and reconsideration of the decision in that case.

(a) The decision in the *Cooper* case is believed to be in conflict with a prior doctrine, intrinsically sounder, an-

nounced by this Court in *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239, 22 L. Ed. 80, 82; *Stanley* v. *Schwalby*, 147 U. S. 508, 37 L. Ed. 259, that the sovereign may avail itself of the benefit of any Act although not named, but is not bound by acts imposing burdens, or tending to restrain or diminish any of its rights or interests, unless named. Statutes creating new rights and remedies are not excepted from the operation of this doctrine. The application of this rule in the *Cooper* case would have given the United States or a State the benefit of the remedy provided by Section 7 of the Sherman Act without binding the United States or the State by bringing it within the definition of that word; it would have shown that *In Re Fox*, 52 N. Y. 530, relied on by this Court, is against the weight of authority; it would have shown that Section 8 of the Act defining the word "person" did not exclude the United States or a State from the remedy provided by Section 7; it would have shown that Section I of the original draft of the bill which was eliminated by Senator Hoar was entirely unnecessary; it would have explained the use of the words "private right of action" in Section 5 of the Clayton Act stopping the running of statutes of limitation, and would have resulted in a construction of the Act in accord with the broad conceptions of public policy upon which it was founded, that the remedies provided should be coextensive with the evils sought to be prohibited.

(b) The question involved is an important question in which all of the States have similar interest. The *Cooper* case was not considered by a full bench, one Justice not participating in the consideration or decision of the case, and there being a vacancy on the Court. The Court divided four to three in the decision. No important private rights of property have intervened since that decision, as a result of it.

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit should be granted.

ELLIS ARNALL,
Attorney General of Georgia,
Counsel for Petitioner.

January , 1942.

Brief follows.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 872

THE STATE OF GEORGIA,

Petitioner,

vs.

HIRAM W. EVANS, JOHN W. GREER, JR., AMERICAN BITUMULS COMPANY, SHELL OIL COMPANY, INC., EMULSIFIED ASPHALT REFINING COMPANY.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

Statement.

This is an application for a writ of certiorari of the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming a judgment of the United States District Court for the Northern District of Georgia.

The material facts and the questions involved are set forth in the foregoing petition. The assignments of error there set forth are here adopted as a part of this brief.

The Decision Below.

The opinion of the Circuit Court of Appeals (R. 41) is reported at *State of Georgia v. Evans, et al.*, 123 F. (2d) 57.

Statement of Jurisdiction.

The statement of jurisdiction set forth in the foregoing petition is here adopted as a part of this brief.

Question Presented.

The question for decision is: Is a State which has been injured in its property by a violation of Sections 1 and 2 of the Act of July 2, 1890, Chapter 647, 26 Stat. 209, 15 U. S. C. 1 and 2, entitled to maintain an action for treble damages under Section 7 of that Act and Section 4 of the Act of October 15, 1914, Chapter 323, 38 Stat. 731, 15 U. S. C. 15.

Contentions of Petitioner.

It was not the intention of Congress, by the use of the word "person" in Section 7 of the Sherman Act and Section 4 of the Clayton Act to exclude a State from the remedies provided by those sections. When a State, as proprietor, has suffered injury analagous to that suffered by a private individual, it may avail itself of the remedies provided "persons" for the relief of such injury. A State is within the definition of "person" as used in a statute providing a remedy for the relief of an injury when the State has sustained the injury sought to be relieved by the statute. But even if a State is not strictly within the definition of "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act, its right to avail itself of the benefit of those sections is inherent by reason of its sovereignty, unless there is shown an intent, expressed or implied, on the part of Congress to exclude it from the remedies there provided. There is no such expressed or implied exclusion in those Acts. The decision of this Court in *United States* v. *Cooper Corp.*, 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 667, is in conflict with a prior doctrine, intrinsically sounder and should be reviewed and overruled.

First Point.

In holding that the case was controlled by *United States* v. *Cooper Corp., supra,* the Circuit Court of Appeals overlooked the decisions of this Court that a State may sue to redress injuries which are analagous to those suffered by a private individual and may be a "person" within the meaning of that word as used in an Act of Congress.

The question of the right of a State to recover treble damages under Section 7 of the Sherman Act and Section 4 of the Clayton Act was not presented, and hence not decided by this Court in *United States* v. *Cooper Corp., supra.* Those Acts have never been construed by this Court on that question. The *Cooper* case is not authority for the result reached by the Circuit Court of Appeals because the reasoning of that decision is applicable only to the United States.

The scheme and structure of the Anti-trust legislation did not afford to a State the relief by criminal prosecution or injunction that was specifically given to the United States. The States, unlike the United States, were not designated as such, nor named in the Acts. Thus the reasoning in the *Cooper* case that the ordinary dignities of speech would have led Congress to mention the name of the United States is not applicable to a State. Neither is the construction of United States officers an aid in determining whether Congress intended to exclude a State from the remedies provided by Section 7 of the Sherman Act and Section 4 of the Clayton Act. Other aids to construction must be sought.

At the time of the passage of the Sherman Act, it must have been apparent to Congress that States were as liable to injury by violations of the Act as were individuals. States had been recognized by this Court as engaging in ordinary commercial transactions with individuals, and for the purpose of binding them, had been held to be acting as

individuals when so engaged. *Murray* v. *Charleston*, 6 Otto 432, 445, 24 L. Ed. 760, 763; *Hall* v. *Wisconsin*, 13 Otto 5, 11, 26 L. Ed. 302, 305. See also, *Reagan* v. *Farmers Loan and Trust Company*, 154 U. S. 362, 390, 38 L. Ed. 1014, 1021.

So, it had been held long prior to the passage of the Sherman Act that every sovereign State is of necessity a body politic or artificial person. *Cotton* v. *U. S.*, 11 How. 229, 231, 13 L. Ed. 675.

In *Ohio* v. *Helvering*, 292 U. S. 360, 369, 78 L. Ed. 1307, 1310, decided more recently, this Court rejected a contention that a State was not a "person" within the meaning of an Act of Congress and as authority sustaining that conclusion, cited cases wherein it appeared that a State had been afforded the benefit of statutes using the word "person." Compare *South Carolina* v. *United States*, 199 U. S. 437, 457-463, 50 L. Ed. 261, 268-270; *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439, 449-453, 82 L. Ed. 1448, 1457-1458.

It was also well established by decisions of this Court prior to the passage of the Sherman Act that a State could sue to redress injuries which were analagous to those suffered by private individuals. *Pennsylvania* v. *Wheeling and Belmont*, 13 How. 518, 559, 14 L. Ed. 249, 266; *Texas* v. *White*, 7 Wall. 700, 19 L. Ed. 227; *Florida* v. *Anderson*, 1 Otto 667, 675, 25 L. Ed. 290, 297. See also, *Missouri* v. *Illinois*, 180 U. S. 208, 45 L. Ed. 497; *Kansas* v. *Colorado*, 185 U. S. 125, 146, 46 L. Ed. 838, 846.

A few years after the adoption of the Sherman Act, the State of Minnesota sought a remedy by injunction under that Act. This was before the Clayton Act gave a remedy by injunction to "persons". It was contended by Minnesota that the Act of Congress was for the benefit of all the people and, therefore, the case was to be deemed one arising under the laws of the United States, and cognizable by the Circuit Court, because one of the objects of Minnesota by its

suit was to protect certain of its proprietary interests, which, it was alleged, would be injured by violations, on the part of the defendants, of the Act of Congress. The attention of the Court was directed by the brief to the rule that a State may sue to redress injuries which are strictly analagous to those suffered by private individuals. The Court recognized the rule, but pointed out that the injury alleged was too remote and indirect to allow an individual to maintain the action. It held that the intention of the Act was to limit direct proceedings in equity to prevent and restrain such violations of the anti-trust act as cause injury to the general public, or to all alike, merely from the suppression of competition in trade and commerce among the several States and with foreign nations, to those instituted in the name of the United States under the 4th Section of the Act. *State of Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 52, 68-71, 48 L. Ed. 872, 873, 880-881.

It is significant, therefore, that when the Clayton Act was adopted in 1914, it not only provided injunctive relief to "persons" using that term with the same meaning as it had been used in the earlier Sherman Act, but added as a part of Section 16 giving the injunctive relief, a proviso, as follows: "Provided, that nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States to bring suit in equity for injunctive relief against any common carrier. * * *" (See appendix.) This was a clear recognition of the broad and inclusive sense in which the words "person, firm, corporation or association" had been used in this section and in other parts of the Act.

Summary.

The allegations of the petition show that the State of Georgia, like any individual, purchased in the open market commodities moving in interstate commerce. By reason of

a violation by the respondents of the Sherman Act, the State sustained an injury to its property; the same injury for which a redress is given to "persons" by Section 7 of the Sherman Act and Section 4 of the Clayton Act. A State has been held to be a "person" within the meaning of an Act of Congress. The implied prohibition which might prevent the United States from pursuing the remedy by civil action for treble damages, because it is named in other sections of the anti-trust acts giving it specific means of enforcing the Acts, does not operate against a State.

Since the anti-trust acts are founded upon broad conceptions of public policy, the remedies provided must be construed as coextensive with the injury sought to be prevented. A construction which would exclude a State from the remedy by civil action for treble damages not only ignores the liberal construction which must be given the remedial provisions of the act, but leads to an unreasonable and unjust result. If a State is a "person" within the meaning of an act of Congress regulating an activity in which a State engages, it is also a "person" for the purpose of availing itself of the remedies provided by an Act of Congress for the injuries which it has sustained.

Second Point.

If a state is not strictly within the definition of "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act, it still may avail itself of the benefit of those sections by virtue of its sovereignty. The decision in *United States* v. *Cooper Corp.*, *supra*, is in conflict with a prior doctrine, intrinsically sounder, and should be re-examined and overruled.

A. *Cooper* case in conflict with doctrine that sovereign may avail itself of the benefit of any act.

The decision in *United States* v. *Cooper Corp., supra,* is in conflict with the doctrine that the sovereign may avail itself of the benefit of any act, although not named, but is not bound by acts imposing burdens or tending to diminish or restrain any of its rights and interests unless named. *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239, 22 L. Ed. 80, 82; *Stanley* v. *Schwalby,* 147 U. S. 508, 515, 37 L. Ed. 259, 262.

This rule was derived from the English Common Law. *Queen and Buckberds Case,* 1 Leon. 149, 74 Eng. Rep. 138; *Lord Berkley's Case,* Plowden 223, 243, 75 Eng. Rep. 339, 372; *The Case of a Fine,* 7 Coke 32a, 77 Eng. Rep. 459.

Thus the question presented in this case, as in the *Cooper* case, does not depend upon whether the sovereign is strictly within the definition of "person" as used in Section 7 of the Sherman Act and Section 4 of the Clayton Act. *The Northern No. 41,* 297 Fed. 343; *The Southern Cross,* 24 F. S. 91.

However, the rule affording the sovereign the benefit of any act has often found its modern application in cases holding the United States or a State to be a "person", entitled to the remedies, benefits, or protection of statutes using that term. *Stanley* v. *Schwalby, supra; In re Western Implement Co.,* 166 Fed. 576, 582; *State* v. *Duniway,* 63 Ore. 555, 128 P. 853, 854; *Vestal* v. *Pickering,* 125 Ore. 553, 267 P. 821, 822; *Indiana* v. *Worâm,* 6 Hill 33, 40 Am. Dec. 378, 381; *People* v. *Utica Ins. Co.,* 15 Johns 358, 8 Am. Dec. 243, 252; *Dixon* v. *United States,* 125 Mass. 311, 28 Am. Rep. 230; *In re Edges Estate,* 339 Pa. 67, 14 A. (2) 293; *State* v. *Odd Fellows Hall Ass'n,* 123 Neb. 440, 243 N. W. 616, 619; *State* v. *Gen. Am. Life Ins. Co.,* 132 Neb. 520; 272 N. W. 555, 557.

Section 7 of the Sherman Act and Section 4 of the Clayton Act affording the right of action for treble damages, are remedial. *Chattanooga Foundry and Pipe Works Co.* v. *Atlanta,* 203 U. S. 390, 397, 51 L. Ed. 241, 244; *Shelton*

Electric Co. v. *Victor Talking Machine* Co., 277 Fed. 433; *Hicks* v. *Pickins Moving and Storage Co.*, 87 F. (2d) 583; *Strout* v. *United States Shoe Machinery Co.*, 193 Fed. 313. The United States or the States, as sovereigns, may therefore avail themselves of the benefit of those sections.

(1) Acts creating new rights and remedies not excepted.

The rule affording the sovereign the benefit of any act does not except acts creating new rights and remedies. The cases of *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 174, 35 Sup. Ct. 398, 401, 59 L. Ed. 520, Ann. Cas. 1916A, 118; *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27, 29, 36 Sup. Ct. 233, 234, 60 L. Ed. 505; *Geddes* v. *Anaconda Copper Mining Co.*, 254 U. S. 590, 593, 41 Sup. Ct. 209, 210, 65 L. Ed. 425, cited in the *Cooper* case as holding that acts creating new rights and remedies are available only to those upon whom they are conferred, were not cases in which the prerogative of the sovereign, or public rights were involved. Public policy dictates that if there be a conflict in the rules, the former must control.

(2) *In re Fox*, 52 N. Y. 530, against weight of authority.

The case of *In re Fox*, 52 N. Y. 530, relied on by this Court as holding that since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it, not only overlooked the rule affording the sovereign the benefit of any act, but was founded upon a failure by the State court to find the authorities sustaining a different result. The New York court said: "But no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or a Nation. Its meaning may be extended by express definition so as to include a government or sover-

eign." Compare *Indiana* v. *Woram*, *supra*; *People* v. *Gilbert*, 18 Johns, 227.

(3) Use of the word "person" in other parts of the Acts.

Since the right of the sovereign to avail itself of the benefit of the remedial provisions of the anti-trust laws does not depend upon it being strictly within the definition of the word "person" as used in those provisions, the fact that the word "person" is used in the same or other provisions of the Acts in a restrictive sense, or in a sense inapplicable to the sovereign, fails to support a conclusion that the sovereign is not entitled to the remedies provided. But under any view of the case, words used in a sense which would burden, or tend to restrain or diminish any of the rights or interests of the sovereign should not be applied to the sovereign unless named or unless demanded by the context. *Dollar Savings Bank* v. *United States*, *supra*; *Stanley* v. *Schwalby*, *supra*; *Nardone* v. *United States*, 302 U. S. 379, 383, 82 L. Ed. 314, 317. Hence the word "person" as applied to the sovereign is used in different contexts. Identical words may be used in the same statute or even in the same section with different meanings. *Atlantic Cleaners and Dyers* v. *United States*, 286 U. S. 427, 76 L. Ed. 1204; *Lamar* v. *United States*, 240 U. S. 60, 65, 60 L. Ed. 526, 528; *People of Porto Rico* v. *Castillo*, 227 U. S. 270, 275, 57 L. Ed. 507, 509.

(4) Definition of "person" in Section 8 of the Sherman Act does not exclude sovereign.

Section 8 of the Sherman Act defining "person" as including "corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country" is a definition of inclusion which was necessary in order to avoid a too strict construc-

tion of the penal provisions of the Act. A definition of exclusion, showing expressed or implied intent on the part of Congress, would have been necessary in order to deprive the sovereign of its prerogative right to take the benefit of the remedial provisions of the Act. *Dollar Savings Bank* v. *United States, supra,* 19 Wall. 239, 22 L. Ed. 82.

The naming of the United States in those provisions of the Acts providing criminal penalties and injunctive procedure for their enforcement can scarcely be construed as an implied prohibition against the sovereign from using the remedy provided for the relief of injury to its property. Most certainly there was no implied prohibition against the sovereign States. *Marshall* v. *New York,* 254 U. S. 380, 383, 65 L. Ed. 315, 318; *In re Edges Estate, supra; Vestal* v. *Pickering, supra; Dixon* v. *United States, supra.*

(5) Supplemental Legislation recognized the rule.

The provision of Section 16 of the Clayton Act that "nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier * * *" amounts to a recognition that the United States could avail itself of remedies granted persons, firms, corporations or associations.

When the Court cites the provision of the Clayton Act (Sec. 5) stopping the running of statutes of limitations in respect to each and every private right of action, the use of the words "private right of action" is significant only because statutes of limitations do not run against the sovereign, and therefore it was unnecessary to stop the statute as to rights of action vested in the sovereign. *United States* v. *Whited,* 246 U. S. 552, 62 L. Ed. 879; *Stanley* v. *Schwalby, supra.*

(6) Judicial expression not persuasive.

The considerable body of judicial expression referred

to by the Court does assert that Section 7 of the Sherman Act affords an individual a civil action for treble damages, but to construe those cases as holding that the United States cannot avail itself of the benefit of that section, when the question was not presented, carries construction beyond the safety zone of reason.

(7) Legislative history not persuasive.

The legislative history of the Sherman Act is inconclusive. The rewriting by Senator Hoar of the original draft of the bill and his elimination of Section I with its provision for civil suits by the United States, is significant only if we presume that Senator Hoar and Congress were not familiar with the rule that the sovereign may take the benefit of any act, although not named.

B. Importance of question and division of opinion authorizes re-examination of *Cooper* case.

In view of the importance of the question involved in which all of the States have similar interests, the close division by which the decision was reached, and the fact that it was not considered by a full bench, petitioner respectfully requests a review and reconsideration of the decision of this Court in the case of *United States* v. *Cooper Corp.*, *supra*. See *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 390, 81 L. Ed. 703, 707; *Helvering* v. *Hallock*, 309 U. S. 106, 119, 84 L. Ed. 604, 612.

Summary.

In an effort to comply with rule 38 (2) of this Court requiring conciseness in the supporting brief, petitioner has not advanced all of the argument which will be urged if this petition is granted. Petitioner believes and strongly urges that the means provided in the anti-trust acts for their enforcement by the United States were not intended as remedies, the granting of which constituted implied pro-

hibitions against the United States from pursuing the remedies afforded persons who are injured in their property by a violation of the anti-trust laws. Certainly there is no implied prohibition against the States. It does not constitute policy-making to apply those rules of construction which petitioner believes should be applied to the remedial provisions of the statutes, consistent with the broad conceptions of public policy which led to their passage.

Respectfully submitted,

ELLIS ARNALL,
Attorney General of Georgia,
Counsel for Petitioner.

APPENDIX.

Act of October 15, 1914, Ch. 323, Sec. 16, 38 Stat. 730, 737, 15 U. S. C. 26.

"That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue; Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."